

1 EASTERN DISTRICT OF NEW YORK

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2 UNITED STATES OF AMERICA 18 CR 684 (ENV)

3 versus

United States Courthouse
Brooklyn, New York

4 ELGIN BRACK and SCOTT BRACK, April 26, 2019
Defendants. 10:00 AM

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7 TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
8 BEFORE THE HONORABLE ERIC VITALIANO
9 UNITED STATES DISTRICT JUDGE

10 APPEARANCES

11 For the Government: UNITED STATES ATTORNEY'S OFFICE
Eastern District of New York
271 Cadman Plaza East
12 Brooklyn, New York 11201
BY: PHILIP SELDEN, ESQ.
13 Assistant United States Attorney

14 For Elgin Brack: JOEL STEIN, ESQ.
30 Wall Street, 8th Floor
15 New York, New York 10005

16 For Scott Brack: STEVE ZISSOU & ASSOCIATES
42-40 Bell Blvd, Suite 302
17 Bayside, New York 11361
BY: STEVEN ZISSOU, ESQ.
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22 Court Reporter: LISA SCHMID, CCR, RMR
Phone: 718-613-2644
23 Fax: 718-613-2379
Email: LisaSchmidCCR.RMR@gmail.com
24

25 Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 THE CLERK: The first case on the calendar is USA
2 versus Elgin Brack and Scott Brack, Case Number 18 CR 684, on
3 for a status conference.

4 Would the attorneys please note their appearance,
5 beginning with Government counsel?

6 MR. SELDEN: Good morning, Your Honor. On behalf of
7 the United States, Assistant United States Attorney Phil
8 Selden. Good morning.

9 THE COURT: Good morning, Mr. Selden.

10 MR. STEIN: Good morning, Your Honor. Joel Stein
11 for Elgin Brack.

12 THE COURT: Good morning, Mr. Stein.

13 MR. ZISSOU: Steve Zissou respectfully appears for
14 Scott Brack. Good morning, Your Honor, Judge Vitaliano.

15 THE COURT: Good morning, Mr. Zissou, as well, and
16 both Bracks.

17 THE CLERK: Counsel for both sides are present,
18 including the defendants.

19 THE COURT: Okay, Mr. Selden. Please catch us up.

20 MR. SELDEN: Absolutely. Thank you, Your Honor.

21 Your Honor, to date, the Government has provided
22 eight discovery productions to defendants Elgin Brack and
23 Scott Brack. Included in those discovery productions are
24 videos, ROIs, as well as advanced 3500 and/or Jencks material.

25 In addition, the Government has offered a reverse

1 proffer to Mr. Elgin Brack, which he has declined, as well as
2 a request for both counsel to alert the Government as to
3 whether or not their clients are interested in possibly
4 resolving the matter short of trial.

5 As we stand here today, the Government anticipates
6 providing an additional discovery production today, including
7 all search warrants unsealed in this case as of yesterday,
8 jail calls and cell site analysis.

9 Thank you, Your Honor.

10 THE COURT: Thank you, Mr. Selden.

11 MR. ZISSOU: You're first, Joel.

12 MR. STEIN: Judge, there was one outstanding
13 discovery -- well, actually, it was two outstanding discovery
14 requests we made. One is -- I assume from Mr. Selden's
15 statements to the Court that the results of a DNA comparison
16 are not yet in from the Office of the Medical Examiners.

17 THE COURT: Is Mr. Stein's assumption correct?

18 MR. SELDEN: That is correct. And as previously
19 been provided to Mr. Stein on multiple occasions, as soon as
20 those results are available, including Government counsel's
21 attempt this morning to call OCME to find out about those
22 results, we will email those results to both counsel.

23 MR. STEIN: Judge, the other outstanding discovery
24 matter which arose in the last day or two -- although I think
25 Mr. Zissou may carry the ball on this -- is at some point down

1 the road, we anticipate filing motions, various motions, one
2 of which would be a motion to suppress based on a car stop
3 by -- I don't know if they're both federal officers and New
4 York City officers, but we made a request yesterday for, among
5 other surveillance, dash cams, and body cameras.

6 And the Government's response, which to me -- to
7 us -- avoided the point, is that the Government has given us
8 all of the information that is within their custody,
9 possession and control, which parrots the language in Rule 16,
10 but the point is whether or not there were cameras which would
11 be relevant certainly to a motion to suppress that we
12 anticipate making, based on a car stop. So, we need to know
13 whether or not there were cameras.

14 MR. ZISSOU: And we're happy to subpoena them
15 ourselves, Judge, but the somewhat of a nonresponse answer,
16 they have turned over everything in their control, that begs
17 the question whether or not they exist.

18 We can litigate whether or not the Government is
19 responsible for obtaining them because in our view, this is a
20 joint federal and state investigation, but be that as it may,
21 if they exist, let us know. We'll issue subpoenas or ask the
22 Court to so order them and we can move along. It's not
23 particularly complicated.

24 I have some other issues, but if Your Honor wants to
25 let Mr. Selden respond to that --

1 THE COURT: Yes. And I'll preview the response: As
2 far as I'm concerned, if there are -- to the extent that any
3 law enforcement agency has been involved in connection with
4 the prosecution of the case, then any and all evidentiary
5 materials in their possession, responsibility of the United
6 States's Attorney's Office to find out if they exist, and if
7 they exist, to provide discovery as required under Rule 16,
8 *Giglio* or some other discovery device.

9 You know, having just concluded a trial where
10 evidence trickled in -- and that's a polite way of referencing
11 it -- I would encourage the assistant if he doesn't know
12 already to find out and get a statement that the camera
13 surveillance, videotapes or whatever you want to call them,
14 either they exist or they do not exist. And I know the
15 problem of getting a definitive answer from the agency, and
16 particularly, NYPD, but that's what you're directed to do, Mr.
17 Selden, unless you already know.

18 MR. SELDEN: Your Honor, I thank you so much.

19 With regards to the defense counsel's inquiry,
20 unfortunately, the way in which the inquiry was characterized
21 was not just about the traffic stop. It was as to all
22 surveillance cameras. And so as the Court is well aware, we
23 want to make sure that we're possibly answering accurately.

24 This request was made yesterday. To date, we have
25 eight discovery productions made to the defense. So if they'd

1 like to go through the prior productions and concerns about
2 Rule 16, we'd be happy to do that.

3 But for that one particular inquiry, it's our
4 understanding that there were not dash cameras during the
5 traffic stop. It's also our understanding that body camera
6 footage was not utilized during the traffic stop.

7 THE COURT: So the record is clear, you've made the
8 inquiry and you've gotten a flat response --

9 MR. SELDEN: Yes.

10 THE COURT: -- from the NYPD that it doesn't exist?

11 MR. SELDEN: And Your Honor, with regards to the
12 actual followup, the reason why Government counsel is making
13 this representation now -- and will follow up in writing -- is
14 because given the tone and the correspondence recently from
15 defense counsel, we are going to be moving forward in writing
16 with answers to their questions, since we have verification
17 from officers, both agents involved.

18 And so as it relates to surveillance footage,
19 though, which is a separate inquiry and a separate request,
20 body camera footage can be opined one way or the other: Just
21 for that traffic stop or for each one of the four robberies
22 that the defendants are alleged to have been involved in.

23 As the Court is well aware, this was a case that
24 involved a shooting, a shooting where a victim was shot,
25 losing his thumb and -- the head. Following that shooting,

1 there were three subsequent robberies. And so in any one of
2 those instances, officers turned on their body cameras.
3 That's something that the Government wants to determine
4 absolutely as soon as possible.

5 There is no body camera footage. We didn't want to
6 immediately rush back and say, yes, there is or no, there is
7 not. We made that request immediately upon the request from
8 Mr. Stein as of yesterday. I spoke with one of the case
9 detectives on the phone, and we're going to get back to them
10 in writing.

11 THE COURT: Well, that is good, and I just want to
12 underscore that if there are multiple detectives involved in
13 this matter, there should be multiple inquiries.

14 MR. SELDEN: Yes. Absolutely, Your Honor.

15 MR. STEIN: ATF, as well as detectives.

16 THE COURT: I don't know if they have --

17 MR. STEIN: Neither do I. That's why we asked.

18 THE COURT: I don't think they do, but if they do,
19 obviously of them, as well.

20 MR. ZISSOU: Judge, I beg your indulgence. The last
21 time I sent an email, I'm fairly certain I wrote it and sent
22 it. The communications were in writing. All he's got to do
23 is respond, "I don't know. I'll check for you," so we don't
24 go through this process.

25 THE COURT: I thought the comment that Mr. Selden --

1 I understood the comment to be made is it's not something that
2 you didn't do. It's something that he may not have done. He
3 may not have put it all in writing. He said he may have
4 communicated to counsel, but he now has indicated that his
5 communications will all be in writing. Whether that writing
6 is the form of paper and pen or whether that's the form of
7 electronic communication by email, it will be in writing.

8 MR. ZISSOU: I will follow the Judge's suggestion in
9 that matter.

10 THE COURT: This way, in other words, we will have a
11 record of it.

12 MR. ZISSOU: That's quite all right.

13 THE COURT: Okay?

14 MR. ZISSOU: Judge, so the other -- there's one
15 other thing if I could just --

16 THE COURT: Yes?

17 MR. ZISSOU: -- two other things, actually.

18 But Mister -- we have been concerned also about
19 search warrants and affidavits in support of search warrants.
20 I heard -- and we -- I think we've made that request before,
21 at least Mr. Stein has.

22 I heard Mr. Selden to say or I heard the attorney
23 for the Government to say that he is disclosing search warrant
24 affidavits that have been unsealed, and so I would simply ask
25 the Court to inquire of the Government whether or not there

1 are still sealed search warrants which he has not made a
2 request to unseal, because we absolutely need those unless
3 there's some protective order.

4 THE COURT: Okay. I got the point. I think Mr.
5 Selden gets the point, as well.

6 If not, you can interpret your statement as being
7 that all that exists now have been unsealed or there's a
8 certain portion of them have been unsealed, but which is it?
9 All of them have been unsealed?

10 MR. SELDEN: All of the search warrants have been
11 unsealed.

12 MR. ZISSOU: Very well. Thank you.

13 And Judge, the last thing that I have is something
14 that appears to be an ongoing problem at the Metropolitan
15 Detention Center.

16 There is, as the attorney for the Government has
17 pointed out, a voluminous amount of material, and it's not
18 just voluminous, but because of the various proprietary
19 software that is required to run some of these videos are
20 different for each of the cameras that were used, if you will,
21 it takes a long time to go through. You've sort of got to
22 download it. You've got to copy. You've got to put it on a
23 different medium. You've got to download some of the software
24 from the internet. It converts them. It takes a while to go
25 through.

1 But as I understand it, neither Scott Brack nor
2 Elgin Brack has gotten a single minute of library time in the
3 five months that they have been in jail, and that's despite
4 the fact that the attorney for the Government, quite
5 graciously, sent all the discovery material in separate
6 packages to each defendant. They simply have not gotten any
7 library time, and it's a problem that is just simply not going
8 to go away. Why the Government hasn't been able to ensure
9 that not only they receive it but they get to view it is a
10 mystery to me.

11 I've made some suggestions. Since then, Mr. Stein
12 and I have made some suggestions. One of them is, let us get
13 a computer. I've done this in a different case in front of
14 Senior Judge Johnson. Send it to the Government from the
15 market, from -- directly from the producer. They load it with
16 all the discovery material and whatever software it needs.
17 They send it directly to the MDC. The clients have it
18 available to them so they can view, as opposed to what was
19 going on.

20 MR. STEIN: In their unit.

21 MR. ZISSOU: In their unit.

22 MR. STEIN: Can I just -- part of the problem,
23 Judge, is that the hard drives that the Government previously
24 provided are in the law library and from what I understand,
25 they go to law library once a week. The fact that they have

1 separations complicates when they can go to the law library.

2 In addition, as I've told Mr. Selden probably more
3 than several times, I think there are at least three different
4 passwords that he's provided me to give to my client to open
5 the discovery when he is able to get into the law library.
6 None of them have been able to work.

7 I'm accepting what my client has told me. I don't
8 go to the law library with him, but the passwords have not
9 worked, so he hasn't been able to access the discovery or has
10 had difficult doing it. I mean, I have shared some of it with
11 him when I go there and Mr. Frisch, before me, I'm sure did so
12 also, but it's a problem on an ongoing basis.

13 THE COURT: You concur with Mr. Zissou's proposed --
14 some of the computer suggestions?

15 MR. STEIN: Yes.

16 THE COURT: Mr. Selden, why doesn't that work?

17 MR. SELDEN: Your Honor, with regards to this case,
18 so that the record is clear, the Government has put Mr. Zissou
19 on emails with Nicole McFarland at MDC Brooklyn. We have
20 suggested that Mr. Zissou reach out to Nicole McFarland, who
21 is the senior staff attorney responsible over there for
22 coordinating discovery.

23 Mr. Zissou has declined. He does not wish to reach
24 out to Nicole McFarland, but instead, has asked the
25 Government -- which we have already done -- to reach out to

1 her. We're concerned that --

2 THE COURT: Do you -- I need a simple yes or no.
3 What they have told me about the inability of the Bracks to
4 get to the library, is that true or not?

5 MR. SELDEN: Your Honor, my understanding from
6 counsel is that that is the case. I've not heard that from
7 Ms. McFarland or anyone else at MDC Brooklyn.

8 THE COURT: So here's the question. Mr. Zissou has
9 offered a solution. Do I have to order it or is the MDC
10 willing to accommodate it?

11 MR. SELDEN: Your Honor, I can't speak to the MDC's
12 position.

13 THE COURT: Submit an order.

14 MR. ZISSOU: Very well, Judge.

15 MR. SELDEN: If I may, Your Honor, just address the
16 concern that the Government has with regards to, for example,
17 a computer going back to the actual cell block.

18 There are sensitive matters in this case. There is
19 included in those matters medical records that have been
20 turned over to the defense. There's a protective order in
21 place in this case. There's video of multiple individuals
22 either being robbed or a shooting of an individual. These
23 videos haven't been blacked out.

24 And in part, the reason why the Government sought to
25 have --

1 THE COURT: Could they see those if they went to the
2 library?

3 MR. SELDEN: Your Honor, it's my understanding that
4 when a defendant goes to the library that they're being
5 supervised, and that they have access to a computer, but that
6 other potential inmates don't have access to that computer
7 while they're looking through their discovery. That's the
8 point.

9 If we could figure out a situation where, for
10 example, as Mr. Zissou suggested, getting a computer and
11 having them be supervised -- the Government's absolutely not
12 opposed to that.

13 THE COURT: Why did it work when Judge Johnson
14 directed it?

15 MR. SELDEN: Your Honor, I would inquire through the
16 Court whether or not that was a national security matter that
17 Mr. Zissou is making reference to.

18 MR. ZISSOU: It was a classified case and he had
19 access to the computer, all of the nonclassified discovery
20 material that was contained on the computer, and he had it
21 with him at all times.

22 Indeed, I have the computer back now because the
23 stipulation was when the case was over, he'd have to return
24 the computer to me and I would dispose of the material in the
25 ordinary course.

1 I won't even send that computer. We'll get a brand
2 new one, straight from the manufacturer, so there's no concern
3 that there is anything hidden in it. They're do all the
4 loading. They'll do all the shipping. It couldn't be cleaner
5 than that. It's the simplest way to handle it.

6 THE COURT: If there are things that need to be
7 redacted, you and counsel can work on that, as well.

8 MR. STEIN: Judge -- Judge, I have a question.

9 MR. SELDEN: Your Honor, with regard to responding
10 to Mr. Zissou, the only concern that the Government would have
11 is that we'd ask Mr. Zissou to reach out to Ms. McFarland to
12 confirm that that is, in fact, something that given the
13 nonclassified nature of this case, that MDC Brooklyn would be
14 willing to do.

15 Unfortunately, just MDC Brooklyn does not work for,
16 you know, in response to every email the Government counsel
17 sends and we're just asking for --

18 THE COURT: Would they respond to an order to show
19 cause to the warden?

20 MR. SELDEN: Your Honor, I think that's an excellent
21 idea, if the first step of Mr. Zissou not reaching out
22 doesn't --

23 THE COURT: I'm tired of waiting, Mr. Selden.

24 MR. SELDEN: Yes, Your Honor.

25 THE COURT: Okay?

1 MR. SELDEN: Absolutely, Your Honor.

2 THE COURT: Either it's going to be accomplished or
3 I'm going to order it.

4 MR. SELDEN: Yes, Your Honor.

5 THE COURT: You tell me what -- since it's you and
6 the Department of Justice which runs the Bureau of Prisons,
7 ask them how they want me to handle it.

8 MR. SELDEN: Yes, Your Honor.

9 THE COURT: Okay?

10 MR. SELDEN: I will absolutely do that, Your Honor.

11 MR. STEIN: Judge, just one concern about this. If
12 Mr. Selden's concern is about the medical records, I have
13 consulted with my client. The medical records don't have to
14 be included in the computer that's sent to the prison. So, if
15 that's only issue as to that, I don't think that's --

16 THE COURT: I think with respect to -- you can do
17 the same thing with any other sensitive document.

18 MR. ZISSOU: Of course.

19 THE COURT: It's not that surprising. I know that
20 in other cases, we have used MP3s, so people can listen to
21 documents.

22 MR. STEIN: Judge, I'm sorry. I don't know if we're
23 finished with this.

24 THE COURT: I don't know. You tell me.

25 MR. STEIN: Well, I meant this subject. There is

1 another subject.

2 THE COURT: Yes, please.

3 MR. STEIN: Okay, Judge. So this was rather
4 disturbing. I'm sure Mr. Selden will not be surprised about
5 my using that term, since he doesn't like my tone, but on
6 April 17th, we submitted a request for a joint defendants'
7 meeting.

8 I have submitted or participated in submitting
9 requests for co-defendants' meetings on dozens of occasions.
10 Some of them are with supposedly violent groups, MS-13,
11 organized crime, Crips, Bloods, you name it.

12 So I submitted on April 17th. I attached to it the
13 first page of the indictment which includes the caption. That
14 is traditionally what the MDC requires, so they can see that
15 they're co-defendants. So I submitted a cover letter with the
16 first page of the indictment showing the caption. On -- this
17 co-defendant's meeting was requested to take place on
18 April 24th.

19 On April 23rd, myself and Mr. Zissou get a message
20 from -- I assume she's in the legal department of the MDC. I
21 wasn't familiar with her name, but I think that's probably
22 true -- saying our request for the co-defendants' meeting was
23 denied. I've been on the CJA panel in this district for over
24 40 years. That has never happened to me.

25 So what happened -- what it turns out happened is,

1 that Mr. Selden, I don't know who initiated the contact,
2 whether it was the legal department or Mr. Selden initiated
3 the contact, he requested -- I assume that's the way he put
4 it -- he requested that the request for the co-defendants'
5 meeting be denied. So this was rather disturbing, especially
6 since it occurred the day before the meeting. I carved out a
7 good part of the day for the meeting, as I'm sure Mr. Zissou
8 did.

9 So we had a -- some testy exchanges with Mr. Selden
10 about this, which were quite unsatisfying, and at one point,
11 we contacted your courtroom deputy to set up a phone
12 conference because their meeting was scheduled to take place
13 that day.

14 Among the things that Mr. Selden sent to us as an
15 explanation for this -- and I, to tell you, Judge, that I
16 think his intervening at all in this was entirely improper,
17 and I mean that word intentionally, and in my experience, over
18 40 years, unprecedented.

19 He said, among other things, that he needs more
20 information other than what was in the caption of the
21 indictment, showing that they were defendants. I don't know
22 what he's talking about and I think it's, frankly, none of his
23 business.

24 Secondly, he then included as a reason a message
25 that I had sent to him about my client's behavior in response

1 to Mr. Selden's repeated requests about setting a trial date,
2 and I told him about my client's conduct. I personally was
3 not concerned for my safety for any reason about that, and I
4 said it in another context. So he included that as an
5 explanation for his requesting them to deny the co-defendants'
6 meeting.

7 So after all this back and forth, we started to
8 request the Court to intervene. Turned out it wasn't
9 necessary, because I got a call from Mr. Selden, I assumed
10 this representative or some representative from the legal
11 department was on the other line also, asking me if I had any
12 concerns for my safety, and I said absolutely none whatsoever.

13 So, after I had to assure the Government that I
14 wasn't concerned about myself, then I get a message or a call
15 that we could now thankfully have our co-defendants' meeting.

16 When I got to the MDC yesterday, I got there a
17 little before Mr. Zissou. They brought my client down. They
18 brought Mr. Zissou's client down. They didn't want us to sit
19 together without Mr. Zissou being there, which I had no
20 problem with.

21 Then a lieutenant comes down. I learned that the
22 lieutenant came to speak to me. He spoke to me several times
23 at Mr. Selden's request, because I asked him where this came
24 from and he told me. It came from the Assistant United States
25 Attorney.

1 The lieutenant wanted to know that if I was okay, do
2 I have any concerns, he was going to watch what was going on.
3 When I've had other complaints at the MDC about various things
4 and asked for a lieutenant to come down, they never come down.
5 Never.

6 This was really very disturbing, and I don't
7 apologize for my tone at all and to emails or to the Court
8 now. This was really distressing.

9 MR. SELDEN: Thank you, Your Honor.

10 Your Honor, with regards to Mr. Stein's tone, we'll
11 step to that point in a moment.

12 THE COURT: I don't even want to hear it.

13 MR. SELDEN: Your Honor --

14 THE COURT: I don't want to hear about tone.

15 MR. SELDEN: And Your Honor, I think that the
16 substance is far more important because while the Government
17 --

18 THE COURT: Address it.

19 MR. SELDEN: Absolutely, Your Honor.

20 Your Honor, on the 17th, as Mr. Stein says, he
21 notified MDC Brooklyn. Government counsel only learned of
22 this notification and this request on Tuesday, April 23rd, at
23 8:12 in the morning. We learned of this not from Mr. Stein or
24 Mr. Zissou but from MDC Brooklyn, asking what our position
25 was.

1 We stated that our position, consistent with our
2 prior separation request, was opposed to two co-defendants
3 meeting. We had safety concerns. Specifically, as outlined
4 in the complaint that the defendant, Scott Brack, had made
5 certain statements inculcating defendant, Elgin Brack, who had
6 safety concerns consistent with that separation agreement
7 about the two co-defendants coming together.

8 Following that interaction, we asked -- not in
9 opposition -- but for more information -- were both lawyers
10 going to be present during this meeting? Were there actual
11 notifications to MDC?

12 As outlined in the conversation with Ms. Cruz at
13 MDC, we had concerns. Why? In part because Elgin Brack has
14 previously been in violation of MDC rules for fighting. He's
15 refused to come to court. And given the allegations in this
16 case, we had those concerns.

17 I have never spoken with a lieutenant from MDC
18 Brooklyn. I have printed up all email correspondence with Mr.
19 Zissou, as well as with Mr. Stein. The conversations were to
20 assure that safety was paramount here. It was not to try to
21 stop their meeting. That's the reason why we asked what was
22 going on.

23 Once we had heard not from Mr. Stein but also from
24 Mr. Zissou on a call with a representative from MDC Brooklyn,
25 they didn't have any safety concerns, we did not have an

1 opposition. That being said, it's up to MDC Brooklyn if the
2 meeting goes forward, and those steps.

3 THE COURT: I think we have now established why we
4 don't admit hearsay into evidence.

5 MR. SELDEN: Absolutely.

6 MR. STEIN: Judge, if we had the old civil
7 procedure, I would enter a *demurrer* and say, so what? I don't
8 think Mr. Selden gets the point.

9 This meeting was none of his business. All of the
10 co-defendant meetings I've had, by definition, the
11 co-defendants had separation orders and some of them were
12 accused of far more violent conduct than this. The point is
13 that this is none of their business.

14 MR. SELDEN: Which we don't want to know what the
15 meeting is about, Your Honor, not the substance, more the
16 safety, which is why I've printed out -- if the Court wants
17 and I don't believe you do.

18 THE COURT: I don't want and Mr. Stein doesn't want.

19 What I'm hearing Mr. Selden say, obviously, there's
20 a disconnect between what you say the timing is and what his
21 perception was, and what his inquiry was, vis-a-vis safety
22 concerns -- not opposing -- and that was what the inquiry
23 was -- the only inquiry that was made.

24 So, the point being, and I believe from his
25 representations in court now, he understands and apparently

1 understood that he has no other interest in whether or not you
2 and Mr. Zissou are able to meet in a joint defense meeting
3 with your respective clients together. Doesn't have -- that's
4 not -- that was never the issue as far as he's concerned.
5 What MDC says its concern was is why we don't admit hearsay.

6 So I think everybody understands. Don't care about
7 tone. Don't care about past history. The fact of the matter
8 is that you and Mr. Zissou should be able to have joint
9 defense meetings when -- try to arrange it.

10 And I know the schedule of counsel. They always
11 tell clients of counsel, you don't really want a lawyer who
12 doesn't have any other clients. You want lawyers who are
13 occupied on other matters. It is hard to schedule them and
14 when something runs afoul of that schedule, it really affects
15 not only the clients in that particular case, but it affects
16 all the other cases that the lawyers are involved in.

17 So it's clear on the record now that neither lawyer
18 has a concern about their personal safety at a joint meeting
19 between -- in and among themselves and their respective
20 clients, and that they should be permitted in the ordinary
21 course, just the way they have been throughout Mr. Stein's
22 history, which apparently antedates the CPLR.

23 Any other things on the defense side?

24 MR. ZISSOU: No, Your Honor. Thank you for your
25 courtesy.

1 THE COURT: And it looks like we're looking forward
2 to a motion schedule of some sort, but it doesn't seem that
3 until more information is made available to defense counsel,
4 as it unfolds, that you have the opportunity to look at the
5 search warrant application to see if there's a motion that
6 would be directed at seizure, we would, again, productively
7 schedule one at this time or am I wrong?

8 MR. ZISSOU: We agree, Your Honor.

9 MR. STEIN: Judge, just let me say, there's nothing
10 really to respond to, but just in terms of motions, one of the
11 motions that I anticipate making is a *Bruton* motion because
12 there was a statement which arguably has some implications.
13 So I ask probably more than once because I always repeat
14 myself, I asked Mr. Selden --

15 THE COURT: I had the occasion to understand that.

16 MR. STEIN: Yes. I asked him if he could tell me --
17 he didn't have to, obviously. He has the right to wait 'til I
18 actually file a motion, but it would simplify things if he was
19 able the tell me what he anticipates the Government's
20 response would be, since the substance of the motion is pretty
21 obvious.

22 There's a statement that has implications. Are you
23 going to redact? Are you not going to not use it? Are you
24 going to leave it -- agree to separation?

25 THE COURT: You know what? I'm going to --

1 Mr. Stein, I'm going to force you two guys to talk to each
2 other later.

3 MR. STEIN: Well, we do.

4 THE COURT: And I'm sure Mr. Selden will understand
5 the point of your inquiry and he'll say, everybody including
6 the Court's time, if there's some resolution on that basis, so
7 that at least you know what if any motion you need to make on
8 that, on the issue of *Bruton*.

9 MR. STEIN: Okay. All we need is a date now, Judge.

10 MR. SELDEN: And Your Honor --

11 THE COURT: I think we should come back to status in
12 relatively short term.

13 If you -- so I think maybe the question, Mr. Selden,
14 is when do you think counsel will have enough time based on
15 what you're producing to look at it, to come back for the
16 purposes of scheduling a -- providing for a motion schedule?

17 MR. SELDEN: Your Honor, my recommendation would be
18 30 days.

19 THE COURT: Thirty days?

20 MR. SELDEN: And the reason in part is because the
21 actual search warrant affidavits are built primarily off the
22 same set of facts and circumstances.

23 I did just want to alert Mr. Stein to the prior
24 position that the Government has taken. We just would ask him
25 to file a motion, so we can know what he's saying in the

1 motion before taking a position. We are trying to sanitize
2 the *Bruton* statement and potentially plan to utilize it.

3 THE COURT: I think that's what he --

4 MR. SELDEN: Yeah.

5 THE COURT: -- he wants to know.

6 MR. STEIN: Exactly.

7 THE COURT: If you plan to use it and you're trying
8 to sanitize it.

9 MR. SELDEN: I was also going to follow up with the
10 Court. I do plan to follow up with Nicole McFarland today,
11 Your Honor. I plan to send a letter, assuming that she is in
12 today. I plan to send a letter today.

13 THE COURT: And let the Court know by the end of
14 next week, and if there is no resolution on getting that
15 computer in and the redactions that both counsel indicated
16 they're willing to make, then counsel, I believe file an order
17 to show -- motion to show cause.

18 MR. ZISSOU: Will do, Your Honor.

19 MR. SELDEN: My hope is that we have a letter with
20 hopefully a position from MDC today --

21 THE COURT: That's fine.

22 MR. SELDEN: -- on Your Honor's desk.

23 THE COURT: And that would be spectacular.

24 MR. SELDEN: Absolutely.

25 THE COURT: And I am giving you a few extra days --

1 MR. SELDEN: Of course, Your Honor.

2 THE COURT: -- because it is Friday.

3 MR. SELDEN: Of course.

4 THE COURT: But I want counsel for defense to know
5 that they have leave to file that motion if, in fact, these
6 efforts on your behalf don't appear -- and I'll look forward.
7 I don't think I've met the new warden of MDC. He'll be able
8 to come sit here in the well and talk to me personally.

9 MR. STEIN: You should go to Judge Brodie's
10 courtroom. He's a defendant in a civil action.

11 THE COURT: Is he on trial now?

12 MR. STEIN: No.

13 THE COURT: No? Okay.

14 MR. STEIN: I think there's something called
15 discovery. It's a civil case having to do with a blackout in
16 the jail.

17 THE COURT: Oh, yes. Jail conditions. Yes, indeed.

18 Well, I'd rather see him in my own courtroom and
19 meet him there. I'll let Judge Brodie take care of matters
20 over there.

21 MR. ZISSOU: Is the 31st okay with the Court, May
22 31st?

23 THE COURT: That is a Friday?

24 MR. ZISSOU: It is, yes.

25 THE CLERK: 10:00 a. m., Judge?

1 THE COURT: Ask the master of the work schedule.

2 THE CLERK: He got the date from me. The 31st, at
3 10:00 a.m.

4 THE COURT: The 31st, 10:00 a. m. Okay?

5 MR. ZISSOU: Judge, we have no objection to the
6 entry of an order of excludable delay until such time, given
7 the applications that have been made today.

8 THE COURT: All right. We have.

9 And the same for you, Mr. Stein?

10 MR. STEIN: I'm sorry?

11 THE COURT: No objection to the waiver?

12 MR. STEIN: Correct.

13 THE COURT: All right. Based on the information
14 that we have provided, the discovery wheels are turning. It
15 is clear that we now have applications, pending motions
16 relating to the ability of the defendants to see some of the
17 discovery that's already been produced and basically, we're
18 aware of that motion that will be -- likely to be made. In
19 fact, we are adjourning this status conference to 30 days, so
20 we can be in a position to actually schedule those motions.

21 So on that basis, without objection of any party, to
22 otherwise meet the ends of justice, we will go over to May
23 31st at 10:00 a.m. in further status. We are going to exclude
24 the time in the interim.

25 So, we'll see everybody on the 31st, unless an order

1 to show cause brings us back.

2 MR. ZISSOU: Thank you for your courtesy this
3 morning, Your Honor.

4 MR. SELDEN: Thank you, Your Honor. May we be
5 excused?

6 THE COURT: (No response.)

7 MR. SELDEN: Thank you, Your Honor. May we be
8 excused?

9 THE COURT: (Nods head affirmatively.)

10 MR. SELDEN: Thank you so much, Your Honor.

11 THE COURT: You're welcome, Mr. Selden.

12 MR. SELDEN: Thank you.

13 (Proceedings concluded.)

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